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No. 85-534 (2)

In The
Supreme Court of the United States
October Term, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

vs.

NEW MOTOR VEHICLE BOARD, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, Third Appellate District

MOTION TO DISMISS OR AFFIRM PURPORTED APPEAL

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LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Appellee Chevrolet Motor Division, General Motors Corporation lists the following non-wholly owned subsidiaries and affiliates:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB—Componentes Automotivos, S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
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GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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No. 85-534

In The

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RICHARD E. WILMSHURST and 49ER CHEVROLET,

Appellants,

vs.

NEW MOTOR VEHICLE BOARD, et al.,

Appellees.

On Appeal from the Court of Appeal
of the State of California,
Third Appellate District

MOTION TO DISMISS OR AFFIRM PURPORTED APPEAL

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee Chevrolet Motor Division, General Motors Corporation respectfully moves to dismiss this purported appeal or to affirm the judgment of the California Court of Appeal, Third Appellate District in this case. The motion is based on the grounds that:

1. The appeal is not within this Court's jurisdiction (Rule 16.1(a));

2. The appeal fails to raise a substantial federal question and the judgment rests on adequate non-federal bases (Rule 16.1(b)); and

3. The purported federal question is so insubstantial that no further argument is warranted. (Rule 16.1(b), (d))

CONSTITUTIONAL PROVISIONS PURPORTEDLY INVOLVED

U.S. Const. Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. XIV, Section 1, second sentence:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Under California law, an automotive manufacturer cannot terminate an "existing" franchisee which protests its termination until California's New Motor Vehicle Board ("Board") holds an adjudicatory hearing and finds "good cause" for the termination. Cal. Vehicle Code §§ 3060, 3066. This action is based on those state law provisions. By it, appellant 49er Chevrolet, Inc. ("49er")

claims that the Board erred in finding that appellee Chevrolet Motor Division, General Motors Corporation ("Chevrolet") had "good cause" to end its franchise relationship with 49er. The court of appeal in this case held, as had the Board and the superior court, that 49er's sales of Chevrolet vehicles were "inadequate," and that those inadequate sales, by themselves, gave Chevrolet good cause to end the franchise relationship as a matter of state law. (Jurisdictional Statement ["Jur. St."], pp. A-6-9, A-18)

The court of appeal in this case also held as a matter of state law that in the absence of a valid franchisee protest, "the manufacturer is free to terminate the franchise without the approval of the Board." (Jur. St., p. A-20) And final decisions by the Board and by the San Francisco Superior Court in other litigation between the parties conclusively establish that 49er was not an "existing" franchisee and therefore had no valid protest rights under the statute.

Faced with those rulings, 49er concocts a purported constitutional argument from the lower tribunals' additional findings that continuation of the business relationship was made "impossible" by the "unjustified and inexcusable" campaign of coercion and intimidation which 49er's owner, Mr. Richard E. Wilmshurst, had heaped on Chevrolet's employees for years. (Jur. St., pp. A-17, A-9-17) 49er says that Mr. Wilmshurst's conduct was protected by the First Amendment and that the assertion of that purported constitutional right falls within this Court's appellate jurisdiction. (*Id.*, p. 2)

This appeal ignores this Court's jurisdictional decisions which define its appellate jurisdiction and show it

to be absent; it ignores the well settled law that this Court will not review a state court judgment which rests on an adequate and independent state law ground; and it ignores this Court's constitutional decisions which prove that 49er's constitutional argument is nonexistent.

This appeal is simply an effort to prolong the inevitable. It has no more merit than the other massive litigation in which 49er has embroiled Chevrolet and which has resulted in 20-plus decisions against it.[1] The appeal is frivolous, and this Court should dismiss it or summarily affirm the judgment below.

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[1] The 20-plus decisions against 49er have occurred in:

—yet another administrative proceeding before California's New Motor Vehicle Board (No. PR-510-83);

—two other superior court proceedings, plus 49er's unsuccessful efforts in this case to hold Chevrolet and the Board in contempt (Sacramento Superior Court No. 317790, Calaveras County Superior Court No. 12445);

—two additional appeals to the Third District Court of Appeal (3 Civil Nos. 24309 and 24893);

—an action in 49er's local small claims court (Calaveras County Small Claims Court No. 82-651);

—an action in the United States District Court for the Eastern District of California (No. 80-861-PCW);

—an action in the United States District Court for the Southern District of California (No. 82-1363-T); and

—various writ petitions in the California Courts of Appeal and the California Supreme Court.

STATEMENT OF THE CASE

This is the second time 49er has asked this Court to overturn adverse decisions respecting its loss of the Chevrolet franchise. Because that prior litigation bears on this motion, we describe it below and then set forth the facts of this litigation.

1. The First Protest.

In 1979, Chevrolet advised 49er that it would not offer 49er a new franchise agreement when the existing, five-year agreement expired by its terms a year later. (Jur. St., p. A-39) That decision was based on Mr. Wilmshurst's irresponsible and destructive conduct which had destroyed the business relationship. (*Id.*) 49er protested that decision to the Board pursuant to Sections 3060 and 3066 of the California Vehicle Code. Those sections provide that upon an "existing" franchisee's protest, an automotive manufacturer cannot terminate the franchise until after the Board holds a hearing and determines that the manufacturer had "good cause" for its action. Sections 3060(b) 3066.[2]

49er's protest was heard by a Board which included other new car dealers who had an economic interest in the decision, and that Board found that Chevrolet lacked "good cause." But even that Board found that Mr. Wilmshurst's conduct had disrupted the parties' business relationship (CT 233), and it warned 49er that it retained jurisdiction to adjudicate the reasonableness of such con-

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[2] Unless otherwise indicated, all section references are to the California Vehicle Code.

duct should Mr. Wilmshurst engage in more of it. (CT 418)

Chevrolet petitioned the San Francisco Superior Court for judicial review, and that court set the Board's decision aside. Specifically, it ruled that the Board lacked statutory jurisdiction to prevent Chevrolet's action because Section 3060's "good cause" requirements did not apply to a fixed term franchise, like 49er's, which had expired by its express terms. (App. C, p. A-43)[3] The superior court also held that the dealer members' economic interest made them biased and that their participation in the adjudicatory process denied Chevrolet due process of law. (*Id.*, p. A-42)

49er appealed, and the First District Court of Appeal affirmed on the constitutional ground. *See Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal.App.3d 533 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 1597 (1984). The California Supreme Court denied a hearing, and this Court denied a writ of certiorari. (Order, dated March

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[3] Contrary to the requirements of Rule 15.1(j), the Appendix to the Jurisdictional Statement does not include the decision of the Board or of the superior court in this case. We therefore attach them to this motion as Appendices A and B, respectively. The Appendix to the Jurisdictional Statement also fails to include (1) the superior court's decision in the First Protest, (2) the Board's dismissal of the First Protest, and (3) the First District Court of Appeal's decision dismissing 49er's petition attacking the Board's dismissal. Because they bear on this motion, we attach them as Appendices C, D and E, respectively. Finally, we attach as Appendices F, G and H the material required by Rule 15.1(j)(iii) and (iv) which the Jurisdictional Statement's Appendix omits.

Because the cost of including this material should have been borne by appellant, we request the Court to order 49er to pay appellee's cost of preparing the Appendix to this motion.

19, 1984, Nos. 83-1183, 83-1185, 83-1195) On remand, the Board followed the superior court's affirmed judgment and dismissed 49er's protest solely for its lack of statutory jurisdiction. (App. D, pp. A-45-46) 49er then petitioned the First District Court of Appeal for review, and following the court of appeal's decision in this case, the First District dismissed 49er's petition as moot. (App. E, p. A-47) 49er did not seek further review, and thus the Board's dismissal of 49er's First Protest for lack of jurisdiction is now final.

2. This Litigation; The Second Protest.

After the Board's decision in the First Protest, 49er virtually stopped selling Chevrolet vehicles and Mr. Wilmshurst continued his course of destructive conduct. Accordingly, on September 18, 1981, Chevrolet notified 49er that commencing November 30, 1981, it would cease business relations with 49er. (CT 86-87) 49er protested that decision to the Board, again claiming that Chevrolet lacked "good cause."

The Board held a hearing in which the biased dealer members did not participate, and it unanimously held that Chevrolet had "good cause" for its action.[4] Specifically, the Board found that that good cause was present both (1) because 49er's sales of Chevrolet vehicles were "inadequate" and (2) because Mr. Wilmshurst had engaged

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[4] 49er says that the evidence before the unbiased Board was the same as that before the biased Board in the First Protest. (Jur. St., p. 10, n.4) That is untrue. Although the unbiased Board took judicial notice of the records of the First Protest, it did so "in order to place in proper context Wilmshurst's behavior" since the hearing on the First Protest. (Jur. St., p. A-21)

in an "unjustified and inexcusable" campaign of coercion and intimidation which had effectively "precluded the rebuilding of any viable business relationship" between the parties. (Jur. St., p. A-9)

On 49er's petition, the Calaveras County Superior Court independently reviewed the record, applied its independent judgment, and also found that Chevrolet's action was based on "good cause." As had the Board, the superior court found that 49er's Chevrolet sales were "inadequate," and that those inadequate sales independently gave Chevrolet good cause to end the franchise relationship. (App. B, p. A-36) The court also found that Mr. Wilmshurst's destructive conduct constituted good cause. Specifically, the court rejected 49er's argument that Chevrolet had made its decision in retaliation for 49er's attempt to "blow the whistle" on Chevrolet's asserted illegality, finding that Chevrolet had acted because of 49er's "unjustified and inexcusable" conduct and manner of making accusations which had precluded the continuation of the business relationship. (App. B, pp. A-30-32)

Thus the court found that Mr. Wilmshurst's conduct went "far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing." (App. B, p. A-30) The court found that "a responsible communication of information to those who should be informed is not what we have before us here." (*Id.*, p. A-31) And the court found that Mr. Wilmshurst "contin[ued]" his irresponsible course of conduct even "long after he was requested to make his complaints as to illegality to counsel, and long after he was warned [by the Board] that his

conduct 'disrupted the relationship' with Chevrolet." (*Id.*) As the court put it:

> "Instead of taking reasonable steps, petitioner has persisted in his conduct and has created a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause, it must be emphasized, is based not on the fact that petitioner sought to 'blow the whistle' on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of Chevrolet's Zone Manager, Mr. West, was 'probably the worst I have ever seen,' (TR. p. 182) producing correspondence so voluminous that 'If we had to do that with 145 dealers, we certainly wouldn't get any other business done.' (Mr. West, TR p. 231)" (App. B, pp. A-31-32)

49er appealed, and the court of appeal painstakingly reviewed the record yet again. It affirmed the findings of "inadequate" sales performance (Jur. St., pp. A-8, A-18), holding that under the state statute "Chevrolet cannot be compelled to continue its relationship with a dealership that has virtually abandoned efforts to sell its cars . . . ." (*Id.*, p. A-8) The court also held that 49er's retaliatory termination theory was "meritless" (*Id.*, p. A-18) and concluded that Mr. Wilmshurst's "conduct and manner of seeking redress was 'unjustified and inexcusable' and 'effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel.'" (*Id.*, p. A-17) As the court of appeal explained,

> "At all times Wilmshurst has had legal channels available to him to settle his dispute with Chevrolet, both in court and before the Board. . . . Yet Wilmshurst chose to persist in a campaign of personal threats and insults against Chevrolet employees in order to coerce a change in practices. Mr. Wilmshurst's conduct ren-

dered it impossible for Chevrolet to effectively do business with 49er and gave it good cause for ending the business relationship." (*Id.*, pp. A-17-18)

The court of appeal denied 49er's petition for rehearing (App. F, A-48), and the California Supreme Court unanimously denied a hearing. (App. G, p. A-49) This purported appeal followed. (App. H, pp. A-50-51)

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ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION.

This Court has appellate jurisdiction to review decisions of state courts where a state statute has been challenged on federal constitutional grounds, "and the decision is in favor of its validity." 28 U.S.C. § 1257(2). 49er's purported appeal fails to meet that statute.

49er has never challenged the constitutionality of the Vehicle Code provisions, and the court of appeal did not decide that unraised issue. Instead, 49er complains only about the Board's findings of "good cause," and argues that those findings violated its constitutional rights.[5] But the Board's findings are not a "statute" within the mean-

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[5] In its opening brief to the Court of Appeal, 49er said its constitutional argument was that "The board may not make a finding supporting its decision not to grant 49er's protest in violation of 49er's right to free speech." (Opening Br., 3 Civil No. 23426, p. 94) The Jurisdictional Statement's Questions Presented likewise make clear that it is the Board's adjudicatory decision, not the state statute, about which 49er complains. In fact, those questions do not even mention the statute, let alone raise any questions as to its validity.

ing of 28 U.S.C. § 1257(2), and 49er's argument does not assert the unconstitutionality of any statute but purports to raise a "right . . . under the Constitution." 28 U.S.C. § 1257(3). Accordingly, appellate jurisdiction is absent, and review is possible, if at all, only by a writ of certiorari. *Lerner v. Casey,* 357 U.S. 468, 473, 475 (1958) (findings in employment termination case that appellant was "of doubtful trust and reliability" were not a statute making attack on them subject to appellate jurisdiction); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958) (dismissing appeal where claim asserted constitutional right, not invalidity of statute); *see Lathrop v. Donohue,* 367 U.S. 820, 824-25 (1961) (Brennan, J.) (whether "statute" is challenged depends on "the character of the State's action" and requires action which is "legislative in nature").

II. REVIEW BY THIS COURT WOULD BE UNWARRANTED.

49er says this is a Supreme Court case because the lower tribunals found that Mr. Wilmshurst's "unjustified and inexcusable" conduct which destroyed the business relationship constituted "good cause" for Chevrolet's action. 49er claims that that conduct was protected by the First Amendment, that it could not constitute good cause, and that the good cause findings should therefore be overturned. (Jur. St., pp. 6-13)

There is no reason for this Court to review that purported constitutional argument. The result below rests on independent state law bases, and the asserted First Amendment argument raises no issue worthy of this Court's review; in fact, that argument is frivolous.

A. Independent State Law Bases.

The bottom line of 49er's case is that the Board should have found that "good cause" was absent and therefore should have prevented Chevrolet's action. But the "good cause" findings rest not merely on Mr. Wilmshurst's irresponsible and destructive conduct but also on independent state law grounds as to which even 49er makes no federal claim.

Thus the decision in this case holds on the merits that good cause was present because of 49er's "inadequate" sales as a Chevrolet dealer.[6] (Jur. St., p. A-18) And the final decision in the First Protest holds that the Board lacked statutory jurisdiction to prevent Chevrolet's action in any event. (App. C, D, E, pp. A-41-42, 45-47) Each of those decisions is based on state law alone; neither presents a constitutional issue; and each independently establishes that the Board properly refused to prevent Chevrolet's action.

Accordingly, this Court should dismiss the appeal pursuant to Rule 16.1(b) and decline to grant a writ of certiorari under 28 U.S.C. § 2103 pursuant to the established law that this Court will not review a state court judgment

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[6] 49er claims that inadequate sales performance was not a "real reason" for Chevrolet's decision, and it cites *Swartz v. Chrysler Motors Corporation*, 297 F.Supp. 834 (D. N.J. 1969) for the proposition that that claim presented a question to be resolved by the trier of fact. (Jur. St., pp. 12-13) But unlike *Swartz*, this case does not arise on summary judgment but after two trials on the merits, one before the Board and the other before the superior court. Those trials resulted in factual findings that 49er's inadequate sales performance subsequent to the First Protest was a legitimate and adequate basis for Chevrolet's decision.

which rests on an adequate and independent state ground. See, *e.g., Jankovich v. Toll Road Comm'n,* 379 U.S. 487, 489 (1965); *Cramp v. Board of Pub. Instruction,* 368 U.S. 278, 281 (1961); *Fox Film Corp v. Muller,* 296 U.S. 207, 210 (1935).

B. Frivolous Constitutional Claim.

49er's argument that Chevrolet's action violated its First Amendment rights is frivolous. First, there was no state action; second, even if there were, the First Amendment does not protect illegitimate or destructive conduct.

1. No State Action.

The "termination of the relationship between Chevrolet and 49er is the result of a purely private decision on the part of Chevrolet." (Jur. St., p. A-19) Accordingly, 49er has no First Amendment claim because "the Fourteenth Amendment prohibits only state action." (*Id.*)

49er recognizes that problem and tries to solve it with alchemy: It says that the Board's decision finding that Chevrolet's action was based on good cause converted Chevrolet's private action into state action. (*Id.*, pp. 8-9) But as the court of appeal correctly held, the Board's decision here did not "transmute" Chevrolet's decision into state action because it did not compel that private action but merely declined to prevent it. (*Id.*, pp. A-19-20) There is nothing remarkable about that holding; it is mandated by the decisions of this Court. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357 (1974) (state commission's failure to overturn private act not state action); *Flagg*

Bros. Inc. v. Brooks, 436 U.S. 149, 164-65 (1978) (state is responsible for private conduct if it compels it; mere acquiescence is not state action).

2. Illegitimate, Destructive Conduct.

The Petition suggests that all Mr. Wilmshurst did was to petition the government about Chevrolet's supposed wrongdoing. (Jur. St., pp. 7-8) But the uncontradicted evidence proves otherwise. That evidence is detailed in the decisions of the Board (App. A, pp. A-1-18), the superior court (App. B, pp. A-19-39) and the court of appeal. (Jur. St., pp. A-1-24)

That evidence establishes that "a responsible communication of information to those who should be informed is not what we have before us here." (App. A, p. A-31) Instead, what this case is about is Mr. Wilmshurst's deliberate decision to refuse to take his complaints to the Board or the courts which could resolve them but to use those purported claims to threaten and insult Chevrolet employees personally. (Jur. St., p. A-17) It is about his decision to take the law into his own hands and to use his law school training so that his purported claims became a means to coerce and intimidate. (*Id.*, App. A, p. A-17) It is about irresponsible conduct, about conduct which went "far beyond" anything "reasonably required," about conduct which was "in no way related to any responsible or legitimate effort" to seek redress of grievances (App. B, pp. A-30-31), about conduct which, if duplicated by others, would have brought Chevrolet's business to a standstill. (App. B, p. A-32)

The court of appeal agreed with the two lower tribunals and held that a private party has good cause to end a private contract where the other contracting party engages in illegitimate, unjustified, inexcusable and coercive conduct which makes continuation of the business relationship "impossible." There is nothing remarkable about that holding either. It is obvious. It is also fully supported by this Court's decisions which make clear that even where the First Amendment applies, it does not protect from civil consequences conduct, such as 49er's, which is not a legitimate effort to secure redress of grievances or which unreasonably disrupts working relationships. *E.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 511-12 (1972); *Connick v. Myers,* 461 U.S. 138, 149 (1983); *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968).

In short, the Jurisdictional Statement simply ignores this Court's controlling decisions which establish that 49er's purported constitutional argument is frivolous. The decision below creates no conflict in the case law, decides no important federal question on which this Court has not spoken and presents no other "special and important" consideration. Rule 17.1. Accordingly, even if the purported constitutional issue were the only issue in the case, it is insubstantial, and this Court should summarily affirm or dismiss the appeal under Rule 16.1 and should decline to grant a writ of certiorari.

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CONCLUSION

This purported appeal should be dismissed or the judgment below should be summarily affirmed.

Dated: October 9, 1985.

Respectfully submitted,

McCutchen, Doyle,
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APPENDIX A

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-348-81

In the Matter of the Protest of 49er CHEVROLET,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 11th day of December, 1981.

/s/ Kathleen O. Turner
President
New Motor Vehicle Board

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Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-348-81

In the Matter of the Protest of 49er CHEVROLET, INC.,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

PROPOSED DECISION

Procedural Background

1. On September 18, 1981, Chevrolet Motor Division, General Motors Corporation (Chevrolet), notified 49er Chevrolet, Inc. (49er), that Chevrolet had decided that it would not do business with 49er after November 30, 1981.

2. On October 9, 1981, 49er filed a protest with the New Motor Vehicle Board (Board), pursuant to the provisions of Vehicle Code Section 3060.[1]

3. A hearing on the protest was held before Sam W. Jennings, Administrative Law Judge for the Board, commencing on November 9, 1981 and concluding on November 11, 1981.

4. Chevrolet was represented by J. Thomas Rosch and Robin Paige Donoghue of the law firm of McCutchen,

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1. All references are to the California Vehicle Code unless otherwise indicated.

Doyle, Brown and Enersen. 49er was represented by Richard Wilmshurst, president of 49er In Pro Per and by Attorney Richard A. Robyn.

Status of Prior Protest

5. The parties to this proceeding had previously appeared before the Board in connection with a prior protest, PR-271-80, filed by 49er in April, 1980 (1980 protest). The 1980 protest was filed following a notice by Chevrolet that it would "not enter into a new Dealer Sales and Service Agreement with 49er," when the then current five-year agreement between the parties expired on October 31, 1980.

6. Chevrolet moved to dismiss the 1980 protest on the ground that the Board lacked jurisdiction to hear the matter in that Section 3060 was applicable only if Chevrolet was attempting to "terminate or refuse to continue" 49er's franchise. Chevrolet contended that the franchise agreement was to terminate by its terms on October 31, 1980, and that Chevrolet was not obligated to offer a new Sales and Service Agreement to 49er. It was determined that Chevrolet's proposed action was within Section 3060, and the motion to dismiss the protest was denied at the pre-hearing conference. Chevrolet filed a Petition for Writ of Mandamus in the Superior Court in San Francisco, seeking a judicial determination that the Board was without jurisdiction. A demurrer was filed in response to Chevrolet's writ. On July 19, 1980, the Superior Court sustained the demurrer without leave to amend.

7. The Board, by its order dated January 28, 1981, sustained 49er's protest on the grounds that Chevrolet had

failed to establish good cause to terminate or refuse to continue the 49er franchise.

8. Following the Board's decision, Chevrolet petitioned the Superior Court in San Francisco for a Writ of Mandamus vacating the decision of the Board.

9. On August 20, 1981, the San Francisco Superior Court granted the Writ of Mandamus ordering the protest be remanded to the Board for disposition not inconsistent with the Court's determinations.

10. An appeal was taken from the Superior Court judgment to the Court of Appeals of the State of California in and for the First Appellate District, Division 1.

11. The Court of Appeals issued an order on November 6, 1981, which temporarily reinstated the Board's decision in the 1980 protest. The order also temporarily stayed the current protest proceedings insofar as the current protest proceedings involve issues determined in the Board's 1980 protest decision.

12. At the hearing on the current protest, filed on October 9, 1981 (1981 protest), the proceedings were limited to what has transpired since the hearing on the 1980 protest. The final day of hearing on the 1980 protest was October 8, 1980.

13. On November 17, 1981, the Court of Appeals granted the Petition for Writ of Supersedeas and/or Prohibition filed by 49er. The petition was granted to the extent that it requested reinstatement of the January 28, 1981 Decision of the Board in the 1980 protest, pending the outcome of the appeal before the Court.

Issues Presented

14. Vehicle Code Section 3061 provides that in determining whether there is good cause for refusing to continue a franchise,

> The Board shall take into consideration the existing circumstances, including, but not limited to:
>
> 1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;
>
> 2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;
>
> 3) Permanency of the investment;
>
> 4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted;
>
> 5) Whether the franchisee has adequate motor vehicles, sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;
>
> 6) Whether the franchisee failed to fulfill the warranty obligations of the franchisor to be performed by the franchisee;
>
> 7) Extent of the franchisee's failure to comply with the terms of the franchise.

15. Chevrolet contends that the business relationship of Chevrolet and 49er has been destroyed as a result of the conduct of 49er's principal, Richard E. Wilmshurst (Wilmshurst).

Findings of Fact

Facts Relating to the Amount of Business Transacted By 49er as Compared to the Business Available to It [§ 3061(1)]

16. In October 1980, 49er made a decision to focus its efforts on selling used vehicles rather than new Chevrolet vehicles. This decision was based upon a belief by Wilmshurst that, under the market conditions, 49er could not generate a sufficient gross profit on the sale of new Chevrolet vehicles to maintain a profitable dealership.

17. The following chart depicts 49er's Chevrolet sales performance for the first nine months of 1981 compared to the first nine months of 1980.

	49er Sales	
	1/81-9/81	1/80-9/80
Retail Car	12	32
Retail Truck	20	84
Total Retail	32	116
Fleet (Car & Truck)	2	46
Total Sales	34	162

18. The following indicates the total number of Chevrolets registered in 49er's area of sales responsibility (Angels Camp area), as well as the number of sales by 49er, for the period of January 1981 to August 1981:

	Number of New Chevrolets Registered in 49er's Area of Sales Responsibility	Number of New Chevrolets Sold by 49er
Cars	26	11
Trucks	32	18
Total	58	29

19. 49er became a Subaru dealer in May of 1981.

20. The chart below indicates the number of new cars in 49er's inventory for the months indicated.

1981	Chevrolet	Subaru
January	8	0
February	6	0
March	3	0
April	5	0
May	7	11
June	6	14
July	4	16
August	4	18
September	6	20

21. From January 1981 through April 1981, 49er spent $907 on advertising. From May 1981, when 49er acquired the Subaru franchise, through September 1981, 49er spent $3,862 on advertising.

22. From May 1981 through September 1981, 49er sold 42 new Subarus and five new Chevrolet cars.

Facts Relating to the Investment Necessarily Made and Obligations Incurred by 49er to Perform Its Part of the Franchise [§ 3061(2)]

23. 49er is a corporation, the entire stock of which is owned by Wilmshurst. Wilmshurst is President of 49er and Chairman of the Board of Directors.

24. 49er was initially incorporated in April 1960, and Wilmshurst has been president since that time. Wilmshurst was first listed as one of the owners on the Dealer's Sales and Service Agreement in 1960 and has been the only person so listed since 1965.

25. The predecessor dealer of 49er was Wilmshurst Chevrolet, a business which was owned and operated by Wilmshurst's father.

26. Wilmshurst Chevrolet and 49er have been Chevrolet franchisees for a total of 48 years.

27. No additional evidence was introduced concerning investments made or obligations incurred by 49er.

Facts Relating to the Permanency of Investment [§ 3061(3)]

28. 49er is located on approximately two acres in the community of Angels Camp. The dealership site contains a body shop, sales office, sales lot, service facility, gas station, and employee parking lot.

29. The land on which 49er is located is owned by Wilmshurst.

30. The value of the dealership land and facilities is estimated to be in excess of $400,000.

Facts Relating to Whether It is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted
[§ 3061(4)]

31. There are presently Chevrolet dealers located in Jamestown and Jackson, approximately 18 miles and 24 miles, respectively, from Angels Camp.

32. Chevrolet has entered into an oral agreement with Livery Stable Independent Service (Livery) to perform Chevrolet warranty and service repairs in the event 49er does not continue to be a Chevrolet franchisee.

33. The Chevrolet agreement with Livery is contingent upon Chevrolet discontinuing business with 49er.

34. Livery is an independent auto shop in Angels Camp, located approximately one-quarter of a mile from 49er.

35. The Livery facility has 17 service stalls. Livery's service facility exceeds Chevrolet's requirements for the area served by 49er.

36. Livery has a well-equipped service and parts department and a complete machine shop. Any Chevrolet parts not in stock can be obtained from a Chevrolet dealer within a 30-minute drive.

37. Chevrolet intends to continue having a dealership in the Angels Camp area and has contacted and interviewed three viable candidates for the dealership in the event 49er is terminated.

Facts Relating to Whether the Franchisee Has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is Rendering Adequate Services to the Public [§ 3061(5)]

38. Chevrolet stipulated that it would not contest the adequacy of 49er's sales or service facilities.

39. 49er's mechanics have been trained at the General Motors Training Center to service 1982 products.

40. No additional evidence was presented.

Facts Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [§3061(6)]

41. No evidence was presented regarding 49er's failure to fulfill the warranty obligations of Chevrolet.

Extent of Franchisee's Failure to Comply With The Terms of the Franchise [§ 3061(7)]

42. Chevrolet did not introduce evidence demonstrating 49er had failed to comply with the general terms of the franchise. However, Chevrolet contends that the entire franchise relationship has been destroyed as a result of Wilmshurst's conduct. Chevrolet's contentions will be addressed below.

Facts Relating to the Conduct of Wilmshurst and Its Effect Upon the Business Relationship of 49er and Chevrolet

43. By letter dated May 22, 1978, Chevrolet requested that Wilmshurst direct any correspondence containing references to California or federal law, or any charges of civil or criminal violations to Chevrolet's legal counsel in San Francisco. Chevrolet renewed its request in a letter to Wilmshurst dated February 27, 1981. Despite these requests, Wilmshurst, a law school graduate, continued to direct such accusations to Chevrolet's personnel.

44. On October 11, 1980, Wilmshurst sent a mailgram to John Hesler, Assistant Zone Manager for Chevrolet, regarding alleged overcharges to 49er. Wilmshurst accused Chevrolet of violating Section 11713.3(h) of the California Vehicle Code and demanded prompt payment.

45. On January 21, 1981, Wilmshurst sent a messagegram to D. S. West (West), Zone Manager for Chevrolet, regarding credits allegedly due 49er. In this correspondence Wilmshurst attacked Chevrolet's system of credits due dealers from Chevrolet because of overbilling, alleging the practice was illegal and imposed unnecessary expense on 49er.

46. In response to several of Chevrolet's letters to 49er, Wilmshurst attached a piece of red tape with the words "red tape" inscribed on it. Wilmshurst would do this when he felt the paperwork was unnecessary. This appears to be little more than an attempt to further antagonize Chevrolet and its personnel.

47. On January 23, 1981, Wilmshurst sent a letter to West, notifying Chevrolet that 49er was increasing its re-

tail labor rate. Wilmshurst requested Chevrolet send 49er the "necessary (unnecessary)" forms so that 49er could again advise Chevrolet that 49er was raising its retail labor rate. On February 3, 1981, Wilmshurst partially completed the change of warranty labor rate form, and submitted it to Chevrolet with red tape attached to it.

48. On January 23, 1981, Wilmshurst sent a letter to West regarding refunds of overbilling on new vehicles. In this letter Wilmshurst attacked Chevrolet's procedures regarding payment of credits due to dealers because of overbillings, and accused Chevrolet of illegal overbilling. Wilmshurst also attacked Chevrolet's established procedures as being ineffective, inaccurate and unworkable.

49. On April 8, 1981, Wilmshurst sent a letter to Robert E. Cook (Cook), Chevrolet's General Sales Manager, regarding Chevrolet's appeal from the Board's 1980 protest decision. Wilmshurst charged that Chevrolet's appeal would result in protracted litigation and was an intentional attempt by Chevrolet to injure 49er and Wilmshurst personally. Wilmshurst also accused Chevrolet's witnesses at the previous Board hearing of not telling the truth.

50. On July 1, 1981, Wilmshurst sent a letter to Cook regarding Chevrolet's non-payment of warranty billings by 49er. Wilmshurst accused Chevrolet of attempting to evade payment for legitimate work performed by 49er and of misusing its corporate power.

51. Between the last hearing and the present protest hearing, Wilmshurst directed approximately 60 letters to West. All correspondence from Wilmshurst was referred to Chevrolet's attorneys for responses.

52. Chevrolet personnel are reluctant to visit 49er unless accompanied by at least one other Chevrolet employee.

53. Wilmshurst engaged in the above conduct since the previous protest hearing even though he knew there were other avenues of redress available to him. Wilmshurst has pursued at least one other avenue of redress by filing an action in the United States District Court against Chevrolet on October 30, 1980. Wilmshurst sought a preliminary injunction, permanent injunction, damages, and jury trial.

54. Wilmshurst was aware that in addition to the courts, the Board's petition process is available as a forum to resolve dealer-manufacturer disputes which are not covered by the protest provisions of the Vehicle Code.

55. In addition to communications with Chevrolet's personnel, Wilmshurst also communicated to third parties concerning his disptue with Chevrolet.

56. In the following letter dated February 2, 1981, sent to Gary McCool, Claims Director, Insured Transporters, Inc., Wilmshurst represented that the Board had ruled for 49er on 49er's petition and that a price-fixing element had been established.

NEW MOTOR VEHICLE BOARD
Exhibit #9—Resp.
File No. PR-348-81

February 2, 1981
Mr. Gary McCool
Claims Director
Insured Transporters, Inc.
100 Industrial Way
Benicia, California 94510

Re: DR. 328994, I. D. #CLN 1498296118

Dear Mr. McCool:

The New Motor Vehicle Board has found for 49er Chevrolet on its Petition.

Therefore, this letter is a final billing and demand for the repairs to the above-referenced LUV truck delivered to our dealership.

Estimate of Repair	$ 960.52
Interest for one year on the outstanding amount through 1/31/81	144.08
	$1,104.60

If we are not in receipt of your check by February 15, 1981, we will bring an action in the Calaveras County Justice Court for trebble [sic] that amount, $3,313.80. We will ask for the trebble [sic] damages based upon the price fixing element established at the Chevrolet hearings.

Very truly yours,

Richard E. Wilmshurst

REW/sld

57. On February 19, 1981, the Board sent a letter to Wilmshurst, cautioning him against misrepresenting the action taken by the Board. There was no petition decision

by the Board since the petition filed by 49er was withdrawn, although a protest was subsequently heard. The Board did not make any determinations concerning the alleged price-fixing by Chevrolet, and Insured Transporters, Inc. was not a party to the 1980 protest hearing. Wilmshurst was advised that if he sought judicial relief by improperly misrepresenting the Board's action, the Board would request permission of the Court to appear to correct any misrepresentations of the Board's decision.

58. On March 17, 1981, Wilmshurst sent a letter to R. L. Cote, Jr. (Cote), President of Courtesy Chevrolet and Chairman of the Chevrolet National Dealer Council. Wilmshurst informed Cote of Chevrolet's appeal of the Board's 1980 protest decision and that Chevrolet was willing to invest over one million dollars in an attempt to put 49er out of business. Wilmshurst accused all of Chevrolet's witnesses of not telling the truth at the Board's 1980 protest hearing.

59. There were not sufficient facts established which would provide a basis for a reasonable belief by Wilmshurst that his accusations in paragraphs 43-58 above were justified.

Determination of Issues

It is determined that there is good cause for Chevrolet to "terminate or refuse to continue" the 49er franchise, in that:

(1) Chevrolet did establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er; [§ 3061 (1)]

(2) Chevrolet did not establish that 49er does not have a material investment and Chevrolet did not establish that 49er has not incurred material obligations in the performance of its part of the franchise; Chevrolet did establish, however, that the investment made and obligations incurred have been directed toward the sale of new Subaru vehicles and used cars rather than new Chevrolet vehicles; [§ 3061(2)]

(3) Chevrolet did not establish that 49er's investment is not permanent; Chevrolet did establish, however, that 49er's permanent investment is now primarily being utilized for the promotion and sale of new Subaru vehicles and used cars rather than Chevrolet products; [§ 3061(3)]

(4) Chevrolet did establish that it would not be injurious to the public welfare for the franchise to be replaced and the business of 49er to be disrupted; [§ 3061(4)]

(5) Chevrolet did not establish that 49er does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of consumers of Chevrolet vehicles and did not establish that 49er has not been and is not rendering adequate services to the public; [§ 3061 (5)]

(6) Chevrolet did not establish that 49er has failed to fulfill the warranty obligations of Chevrolet; [§ 3061(6)]

(7) Chevrolet did not establish that 49er has failed to comply with the general terms of the franchise. [§ 3061(7)]

Chevrolet did establish that Wilmhurst engaged in a course of conduct attacking Chevrolet's policies and procedures as well as the conduct and character of the Chevrolet personnel charged with implementing such policies.

Since the Board's hearing on the 1980 protest, Wilmshurst has continued to engage in conduct which the Board previously found to be disruptive of the relationship between the parties. The Board's prior decision indicated that the Board did not condone the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities. In spite of the Board's statements, Wilmhurst persisted in his disruptive course of conduct.

Wilmshurst used threats of criminal, economic, and moral sanctions in his attempts to coerce and intimidate Chevrolet's personnel. Wilmshurst did this, despite the fact that he did not believe Chevrolet's personnel or practices were in any way discriminating against 49er or himself personally.

This conduct by Wilmshurst was unjustified and inexcusable in light of all the circumstances. Wilmshurst's conduct effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel.

* * * * *

The following proposed decision is respectfully submitted;

The Protest is overruled. Chevrolet has established good cause to "terminate or refuse to continue" the 49er franchise.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates at Sacramento, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: December 7, 1981

/s/ Sam W. Jennings
SAM W. JENNINGS
Administrative Law Judge
New Motor Vehicle Board

APPENDIX B

SUPERIOR COURT OF THE
STATE OF CALIFORNIA COUNTY OF CALAVERAS

No. 11169

49ER CHEVROLET AND RICHARD E. WILMSHURST,

Petitioners,

v.

THE NEW MOTOR VEHICLE BOARD,

Respondent,

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Real Party in Interest.

STATEMENT OF DECISION

Petitioner seeks review by administrative mandamus of the decision of the New Motor Vehicle Board dated 12-11-81 holding that Chevrolet had good cause to end its relationship with petitioner, and denying petitioner's protest which had been filed pursuant to Vehicle Code Section 3060. It appears that an earlier decision of the board, dated 1-28-81 is on appeal and the appellate court has issued a stay order which is an issue herein and will be discussed later.

This matter was heard on May 17, 1983, and the court issued its Tentative Decision on June 22, 1983. Petitioners 49er Chevrolet, Inc. ("49er") and Richard E. Wilmshurst filed requests for a statement of decision

on July 5, 1983. One request poses twenty-five questions; the other thirty-three. To the extent that those questions specify "principal controverted issues at trial" (CCP § 632), the factual and legal basis for the court's decision as to those issues is explained in this statement of decision.

A. Preliminary Matters.

1. Mr. Wilmshurst's Status as a Petitioner.

Administrative proceedings before the board of the type here involved are commenced when a "franchisee" files a protest. Vehicle Code Section 3060. The protest in this case was filed by 49er; Mr. Wilmshurst as an individual did not file a protest and was not a party to that proceeding. He appeared at the administrative hearing on behalf of 49er, assisted by Mr. Robyn. The petition filed with the Superior Court, initiating the present action, includes both Mr. Wilmshurst and 49er as "Petitioners" but the prayer refers only to "Petitioner".

Chevrolet has moved to dismiss Mr. Wilmshurst as an individual, asserting that since the petition seeks judicial review of the protest, and since only 49er was the protestant, only 49er is a proper party as petitioner. Counsel explained that this technical matter had seemed unimportant until a few days before the hearing when it appeared that separate counsel was to appear for 49er. The court agrees that Mr. Wilmshurst is not a proper party as an individual, and with the qualification hereafter noted grants the motion that Mr. Wilmshurst be dismissed as petitioner.

Since this issue was not raised until trial, and since various materials have been filed with the court, and the

trial itself conducted, as though there were two petitioners, the court will treat all points and authorities and any other materials which have been filed as having been properly filed on behalf of 49er, and all contentions made by Mr. Wilmshurst either in writing or in oral argument will be fully considered and their impact will in no way be diminished by the ruling that Mr. Wilmshurst as an individual is not a party. In other words, that ruling will have no effect at all on the outcome of this case insofar as 49er is concerned[1]

2. Standard of Review.

The court is satisfied that the independent judgment test is appropriate, and that the court must consider the entire record to determine whether or not the board's decision is supported by the weight of the evidence.

3. Judicial Notice.

One issue raised by petitioner should be considered at the outset, the question of judicial notice. ALJ Jennings said he would (over the objection of petitioner) take judicial notice of the earlier proceeding. The court agrees with petitioner's argument that such notice must be limited, as explained in Jefferson's Evidence Bench Book, cited by petitioner. (Vol. II, Sec. 47.2) That is, it would be improper to accept as facts in the present case all of the evidence shown in the transcript or exhibits of the earlier

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[1] One of the questions put in Mr. Wilmshurst's request for a statement of decision asks whether he was an "indispensable party to the proceeding involving the Chevrolet Sales and Service Agreement". (No. 1) As phrased, that question does not specify an issue which was tried. The issue was the one discussed in the text.

case unless such facts or exhibits were properly admissible as evidence in the present case as admissions or otherwise, or were stipulated into evidence.

Petitioner concedes that it was proper to take judicial notice of the existence of the records of the earlier proceeding (Pet. Br., p. 18), and it was not error for the ALJ to do so. Petitioner also concedes that the board could take judicial notice of the truth of its findings in its first decision. (Pet. Br., p. 18)

Unfortunately, it is unclear just what use the ALJ made of the records of the earlier proceeding. However, it does not appear that his findings or conclusions were based on any inadmissible matter.[2] And in exercising its independent judgment to determine whether the board's findings are supported by the weight of the evidence, this court has considered only evidence properly before the board in the second hearing, namely that which was admitted in evidence at the second hearing, admissions of the parties in the first hearing, and the findings of the board in its first decision.

B. The Principal Controverted Issues.

Having determined the preliminary questions, we turn now to the principal controverted issues at trial which were urged by petitioner:

1. The hearing violated the Appellate Court's stay order.

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[2] Mr. Wilmshurst's request asks whether the judicially noticed material "could have" improperly influenced the ALJ's decision. (No. 2) That academic question is not an issue in the case.

2. The decision is not supported by the weight of the evidence.

3. The decision is an unconstitutional impairment of petitioner's right of free speech.

4. The hearing officer should have disqualified himself because of actual bias.

1. *Does the action of the board violate the stay of 11/6/81?*

By its terms, the appellate court's intermediate order stays the proceedings insofar as they "involve issues determined in the January 21, 1981 decision." The order is designed to prevent relitigating issues previously "determined" in the earlier hearing which was concluded on October 8, 1980. It would not preclude determination of issues which arose after that date, and which could not therefore have been covered in the earlier decision.

To ascertain just what issues were determined in the first hearing, we must look to the language of the decision. Just as in the present case, the hearing came about because petitioner filed a protest challenging the attempt by Chevrolet to end their relationship. The relief sought by petitioner is provided for in Section 3060 et seq., of the Vehicle Code which states that "no franchisor shall terminate or refuse to continue any existing franchise" unless the board finds good cause for such action, following a hearing under Section 3066. Section 3061 lists 7 factors which may be considered in determining good cause, but the list is not exclusive. Much of the language of the 51 page decision in the first protest related to conduct of Chevrolet in its relationship to 49er over an

extended period of time. (The parties have agreed that the decision does not contain any determination that Chevrolet was guilty of illegal price fixing, TR. pp. 114, 115.) To see if the stay order was violated we must first ascertain what were (in the court's words) the "issues determined" in that decision. They appear on page 49, headed "DETERMINATION OF ISSUES." All seven of the factors listed in Section 3061 are considered and with respect to each one it is determined that Chevrolet failed to establish it.

The decision then continues: "Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and required procedures as well as Chevrolet personnel charged with implementing such policies. However, all the disputes between the parties involved, or had their origin in, Chevrolet's policies pertaining to reimbursement of 49er for sums owed to 49er by Chevrolet."

"Some of Wilmshurst's conduct disrupted the relationship between the parties. In the absence of other circumstances, Wilmshurst's conduct would be unjustified and inexcusable. However, the circumstances present here evidence that Wilmshurst had reasons for his complaints, and that his belief that Chevrolet's policies and procedures operated unfairly and illegally against his dealership was reasonable and held in good faith." (p. 50)

"Although not condoning the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities in their relationship, Chevrolet's policies and procedures, and their application to 49er, mitigate against allowing Chevrolet to terminate or refuse to continue the 49er franchise." (p. 51)

The board concluded that Chevrolet had failed to show good cause, and 49er's protest was sustained. Chevrolet obtained a writ of mandamus from the San Francisco Superior Court, and it is the appeal from that judgment which is presently pending and gave rise to the appellate court's stay order.

How do the issues determined at the earlier hearing compare to the issues now before us? Aside from the very issue we are now discussing (the scope of the stay order) the remaining issues of substance presently before us are (1) Is the decision of the board supported by the weight of the evidence, (2) Is the board's action constitutionally invalid because of the First Amendment, and (3) Is the decision invalid because of bias on the part of the ALJ?

In determining whether good cause had been established the board in the present proceeding made determinations on a number of issues (p. 16 of the decision): The amount of business transacted; the use of the permanent investment for sale of Subarus instead of Chevrolets; possible injury to public from a change of franchise; and the conduct of the petitioner since October, 1980 ("continued to engage in conduct which the board previously found to be disruptive of the relationship between the parties").

None of the issues determined at the second hearing had been previously determined by the hearing which concluded on October 8, 1980, although it does appear that with respect to some issues (e.g. decline in sales) reference was made for comparison purposes to matters prior to that date. Specifically, although Mr. Wilmshurst's conduct

prior to October 8, 1980 was an issue at the first hearing, the board did not redetermine that issue at the second hearing. Mr. Wilmshurst's conduct subsequent to October 8, 1980 was an issue determined at the second hearing, but it was not an issue at the first hearing, and the stay order does not prevent litigation before the board as to, and a board decision on, that conduct.

Contrary to what appears to be petitioner's contention, the order does not prevent consideration of any evidence of events transpiring before the first hearing; such evidence may properly be considered as background for the issues to be determined at the second hearing so long as there is no attempt at the second hearing to redecide issues which had been decided at the first hearing.

There was no such attempt: none of the board's findings at the second hearing (including Findings 43 and 44) redecided any issue which had been decided at the first hearing; and petitioner's claim that the stay order was violated must be and is rejected.[3]

2. *Is the decision of the board supported by the weight of the evidence?*

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[3] Mr. Wilmshurst's request asks whether the board's findings in its first decision respecting some aspects of his prior conduct "were justified" and would be res judicata. (No. 4) What the board previously found was not an issue which was tried. Because the board did not relitigate anything it previously found, whether those findings constitute res judicata is also not an issue which was tried.

Chevrolet argued that because the stay order on which petitioner relies was superseded prior to the board's decision, that intermediate stay order no longer placed any restraint on the board's decision making. Because the court finds that the intermediate order was not violated, it does not reach this argument.

(a) *Mr. Wilmshurst's conduct.*

Petitioner specifically refers to a number of the board's findings in support of his contention that the decision is not supported by the evidence. However, more often than not both 49er and Mr. Wilmshurst agree with the factual accuracy of the finding but argue about its significance and interpretation. Thus Finding No. 16 is not challenged, but petitioner states that it was a reasonable business decision. The factual accuracy of the following findings is not attacked: 17, 18, 19, 20, 21, 43, 44, 45, 46, 48, 49, 50, 51, 53, and 54. Accordingly, out of the more than 50 numbered findings, petitioner attacks the factual accuracy of only two, and the factual accuracy of those two findings are the only "controverted issues at trial" insofar as the court is to determine whether the findings are supported by the weight of the evidence. Those two findings are Nos. 47 and 52.

Finding No. 47. Petitioner states that it is "not supported by the record in total." A review of his comments (p. 28, Petitioner's Points and Authorities) shows that he is really arguing the interpretation of the facts, not their existence. The court finds that Finding No. 47 is supported by the weight of the evidence.

Finding No. 52. This finding is that "Chevrolet personnel are reluctant to visit 49er unless accompanied by at least one other Chevrolet employee." Attacking this, petitioner cites pages 215 and 216 of the transcript, wherein under cross-examination by Mr. Wilmshurst, Chevrolet's zone manager Mr. West testified as follows:

A. "Mr. Wilmshurst, they've lost respect completely and totally and will not go into your place of business without a witness."

Q. Mr. West, are they instructed not to go into 49er Chevrolet without a witness?

A. They certainly are.

Q. If you instruct someone to do something, can you complain about the results?

A. I don't understand your question.

Q. Okay. You're complaining that they can only go into 49er Chevrolet with a witness, and you have instructed them to do so. You could also instruct them not to, couldn't you?

A. "I'm not complaining. I'm not complaining. I state that I have told them not to go into the dealership without a witness because of the past accusations against them."

The above testimony is referred to by petitioner. But it must be considered in the light of additional testimony by Mr. West, on redirect:

Q. "Did you direct any zone employee not to visit 49er alone who hadn't told you that he didn't want to do so?

A. No, I did not."

Taking all of the above testimony together, it is the conclusion of the court that Finding No. 52 is supported by the weight of the evidence. (The court finds this conclusion is supported by common sense as well as testimony: It is simply not reasonable to believe that Chevrolet em-

ployees would enjoy the relationship they had with 49er, and it is reasonable to believe, as Mr. West's testimony indicates, that they were reluctant to make such visits unaccompanied, and that it was this reluctance which led to Mr. West to issue his instructions.)[4]

Petitioner does not really attack the factual basis of the decision. Instead, he argues that his conduct is "completely justified" as "objections to Chevrolet's criminal violations" (Petitioner's Points & Authorities, page 31). Petitioner views the case as one involving a dealer who is justifiably taking strong action in a number of ways against a manufacturer who breaks the law continually and presents perjured testimony. In petitioner's eyes, the unconscionable conduct of Chevrolet completely justifies all of his actions and Chevrolet cannot, therefore, show any good cause to end the relationship.

But the court has no evidence establishing such illegal conduct on the part of Chevrolet. Specifically, the court finds that the evidence, including Exhibit 8 and the testimony of Gary McCool, fails to show any illegal conduct by Chevrolet or any admission of illegal conduct.[5]

Moreover, the facts show that Chevrolet did not seek to terminate the relationship simply because petitioner has

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[4] Both requests (No. 7) ask whether Chevrolet employees who visited 49er after the first hearing complained of their contacts. That question, at most, refers to an argument; it does not specify an issue which was tried. The issue is whether Finding 52 is supported by the weight of the evidence, and the Court finds it is.

[5] The court also finds that the filing of a federal class action in San Diego is no evidence of illegal or wrongful conduct, much less prima facie evidence of illegality.

charged it with illegal conduct. Petitioner could have made that charge in a number of ways without disrupting the business relationship. Based on the weight of the evidence the court finds, as did the board, that Mr. Wilmshurst's conduct was "unjustified and inexcusable" and "precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." (Dec. p. 18)

In essence, petitioner's position is that where a dealer complains of illegal conduct by the manufacturer, such complaints cannot constitute good cause for ending the relationship. Such a contention might be on sound ground in some other case. For example, if the letter to Mr. Jaffe at the United States Senate (Ex. 2) complaining of Chevrolet's conduct were the cause of the termination, a serious question would be raised. A strong argument can be made that public policy should prevent the termination of a dealership solely because the dealer has complained to the wrongdoer, or has presented evidence of criminal wrongdoing to the appropriate officials.

But that is not what we have here. Petitioner's conduct goes far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing. The court assumes that petitioner would have the right to engage in reasonable conduct to notify the prosecutor, the press, the legislature, or other responsible agencies that a crime was being committed, and that the exercise of that right cannot give rise to a retaliatory termination of the dealership. (In other words, a termination in such circumstances would not be for "good cause".)

But such a responsible communication of information to those who should be informed is not what we have before us here. Petitioner for many months, continuing long after he was requested to make his complaints as to illegality to counsel, and long after he was warned that his conduct "disrupted the relationship" with Chevrolet, continued to engage its employees in a series of running battles over various issues.

If the first amendment or other public policy were to protect a leader's conduct under circumstances like this, either directly or by policy implications, the protection would be limited to such speech as might be deemed reasonably necessary to further the underlying policy. Such policy considerations argue in favor of preventing retaliatory termination where a dealer in good faith brings illegal conduct to the attention of the manufacturer, the government, or the press. But petitioner's conduct here is in no way related to any responsible or legitimate effort to notify authorities, or the manufacturer or to obtain an adjudication on the merits of his complaints. Had petitioner desired, his grievances could have been heard by a petition before the board. (62 Ops. Atty. Gen. 776, 11-30-79) They might also have been determined in other ways, such as in the federal court action now pending in San Diego. Instead of taking reasonable steps, petitioner has persisted in his conduct and has created a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause, it must be emphasized, is based not on the fact that petitioner sought to "blow the whistle" on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of Chevrolet's

Zone Manager, Mr. West, was "probably the worst I have even seen," (TR p. 182) producing correspondence so voluminous that "If we had to do that with 145 dealers, we certainly wouldn't get any other business done." (Mr. West, TR p. 231)

There is no evidence here of illegal conduct by Chevrolet. Even if there were such evidence, it would not *automatically* follow that termination was improper. If good cause is established for termination, and it appears that the termination was not merely a retaliatory move because of allegations of unlawful conduct, then termination should be upheld. That is, if there is adequate basis for termination wholly aside from a retaliatory move, and if the termination is in good faith based upon such other grounds, then the critical questions is not whether Chevrolet had engaged in unlawful activity, but rather whether or not Chevrolet had established good cause for the termination.

The requests for a statement of decision filed by Mr. Wilmshurst and 49er contain a number of questions about Mr. Wilmshurst's destructive conduct.[6] None of them specify an issue which was tried. The issue was whether the weight of the evidence demonstrated that Mr. Wilmshurst's conduct, taking into account the context in which it occurred, including Chevrolet's conduct, constituted good cause for Chevrolet's decision to end the business relationship. The court finds it does. The court, however, will go on and address the arguments raised by those questions.

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[6] 49er Request Nos. 4, 10, 11, 13, 14, 20, 21, 24, 25, 26, 28, 29, 33; Wilmshurst Request Nos. 10, 11, 13, 14, 20, 21, 24, 25.

(1) *Chevrolet's conduct.* Several questions[7] ask about Chevrolet's conduct, and whether the court considered it. The subject matter of those questions is involved in this case only to the extent that it relates to petitioner's apparent argument that Chevrolet's actions constituted a justification for petitioner's destructive conduct. The court has considered Chevrolet's conduct; finds that it provides no justification for petitioner's destructive conduct and specifically finds, as did the board, that petitioner's conduct was "unjustified and inexcusable".

(2) *Specific acts.* Some questions[8] ask the court what particular conduct would constitute good cause. Those questions fail to understand the board's decision and the court's role in reviewing it. Neither the board nor the court was called on to decide whether "particular" incidents, if they had occurred alone, would constitute good cause. The job of both the board and the court was to find whether the conduct which did in fact occur, taken together, constituted good cause. As explained above, it did.

(3) *Mr. Wilmshurst's beliefs.* Two questions[9] ask about the reasonableness of Mr. Wilmshurst's beliefs. To the extent they refer to conduct involved in the first hearing they are not relevant here. To the extent they relate to the conduct involved in this hearing, the court finds, as did the board, that Mr. Wilmshurst lacked a reasonable be-

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[7] 49er Request Nos. 10, 13, 24, 25, 27, 28, 33; Wilmshurst Request Nos. 10, 24, 25.

[8] 49er Request No. 11; Wilmshurst Request Nos. 11, 13.

[9] 49er Request Nos. 4, 29.

lief that his conduct and method of making accusations were justified. (Dec. Finding 59; see p. 21, below)[10]

(4) *Hypothetical questions.* Several questions[11] ask about complaints by victims of wrongdoing and a franchisor's response to them. For reasons given above those hypothetical and argumentative questions do not relate to this case. The court has dealt above with the issues tried in this case to which petitioner presumably intends those questions to relate.

(b) *Petitioner's sales performance and use of investment.*

Petitioner challenges the board's determination that 49er's permanent investment is now used primarily for the sale of Subarus and used cars. In support of his contention petitioner refers to the sums invested in car and truck parts. But this is not a "permanent" investment. The court finds that the weight of the evidence does support the decision in its determination that the "permanent" investment—i.e., the dealership facilities and good will—was used primarily for used cars and Subaru sales rather than Chevrolet sales.

Petitioner has also raised a question with respect to the board's conclusion (p. 16) that "Chevrolet did establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er." (V.C. Sec. 3061(1)) Petitioner argues that here the

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[10] This finding is not crucial to the board's or the court's decision. The issue is Mr. Wilmshurst's conduct, not his subjective state of mind.

[11] 49er Request Nos. 14, 20, 21, 26; Wilmshurst Request Nos. 14, 20, 21.

board considered only new vehicle sales, whereas it should have considered service, sale of parts, and of used cars, in determining the "amount of business" as that term is used in the statute.

The disputed language appears in a section which does not purport to be an exclusive listing of factors to be considered, but rather recognizes the existence of possible additional factors not enumerated. None of these factors is said to be controlling in itself. Presumably, the board could have set up as a factor not otherwise listed one specifically relating only to the sales of new vehicles, and such a consideration would be properly before the board in making its determination of "good cause". Therefore, it makes little difference what the legislature meant when it put together its nonexclusive list of existing circumstances for the board to "take into consideration". It is quite clear that the board was using only new vehicle sales and since Vehicle Code Section 3061(1) gives it the right to consider new vehicle sales as a factor in determining good cause, the decision cannot successfully be attacked on this ground. The real question is, was there sufficient evidence so that the court, exercising its independent judgment, can say that the decision was supported by the weight of the evidence? In making this determination the court is not confined to the seven items listed in V.C. 3061(1).

In any event, taking the language in context and having in mind the essential purposes of the legislation, it appears that the legislation was referring to new vehicle sales. Finally, it should be noted that the board did have before it facts relating to sales of parts and used cars as well as the data on new vehicle sales. (p. 13)

Petitioner also argued that its decision to use its permanent investment for the sale of used cars and Subarus and not Chevrolets was a reasonable business judgment. But the issues concern the use of petitioner's permanent investment and the adequacy of its Chevrolet sales performance, not the reasonableness, from petitioner's point of view, of its decision to essentially cease selling Chevrolet vehicles. Even if petitioner believed it could make more money by selling vehicles other than Chevrolet products, that does not makes [sic] its inadequate Chevrolet sales performance adequate; indeed, it emphasizes the presence of good cause for Chevrolet's decision to end the business relationship.[12]

Petitioner has also argued that economic conditions were a factor in its sales performance, and four of the questions in the requests relate to that argument.[13] The court has taken the facts respecting those arguments into account. The court finds that the weight of the evidence demonstrates that petitioner's Chevrolet sales performance was "inadequate as compared to the business available" to it (Dec., p. 16) and that that inadequate sales performance independently demonstrates "good cause" for Chevrolet's decision.

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[12] Two of the questions in the requests relate to whether it was reasonable for 49er to take on a new line of cars. (49er Request No. 16; Wilmshurst Request No. 16) Those questions do not relate to the issues tried for the reasons stated in text and also because neither Chevrolet's action nor the board's decision was predicated on petitioner having taken on a new line.

[13] 49er Request Nos. 15, 22; Wilmshurst Request Nos. 15, 22.

(c) *Miscellaneous.*

As to all of the board's findings of fact, whether or not specifically questioned by petitioner, the court finds that they are supported by the weight of the evidence, except as to Finding No. 59. This finding would be supported by the evidence if it were reworded to replace the word "accusations" with the words "conduct and method of making accusations." This does not change the ultimate outcome but does more accurately state a conclusion that the weight of the evidence will support. (This makes clear that petitioner could reasonably have thought it proper to continue to protest and accuse, provided it was done in a reasonable manner.) The court finds that Finding No. 59, as thus amended, is supported by the weight of the evidence.

4. *Should the hearing officer have disqualified himself because of actual bias?*

The only evidence of bias offered is the letter directed to the petitioner, which was Exhibit 10 at the board hearing. That letter is forthright and factual. Considering the circumstances under which it was written it is not evidence of bias but simply evidence that Mr. Jennings was doing his job in a businesslike manner. The fact that he wrote such a letter in his capacity as Executive Secretary some eight months before the hearing does not as a matter of law disqualify him. Specifically, the court finds that the use of that letter in Finding 57 is not evidence of bias and was not testimony at the hearing.

Furthermore, the facts with respect to Mr. Jennings' role as Executive Secretary, and in particular the letter

from Mr. Jennings to petitioner, were well known to petitioner at the start of the hearing.[14] Any objection to the qualifications of the hearing officer, either because of his dual role, or because of the episode of the letter, should have been made on the record at the time. The facts were well known to petitioner then. Instead, petitioner waits until an adverse decision is reached and *then* urges that some other judge should have heard the case.

While the statutes and case law with respect to judicial disqualification may not expressly apply to an administrative proceeding, they are helpful authority here. One of the most basic principles, which rests upon simple fairness, is that one who is well aware of possible grounds for disqualification cannot sit back and gamble on a favorable outcome and then, if the result is not favorable, claim a right to a new hearing on the grounds of bias which had not previously been objected to. (Witkin, Vol. I, California Procedure, pages 364-366) So here, even if it is assumed petitioner's objections were well taken, which they were not, the failure to raise them until after the decision is fatal.

The Decision was Supported by the Weight of the Evidence.

The various findings have been considered, and those specifically referred to by petitioner have been discussed, and the court has concluded that the findings are (with

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[14] Specifically, the court finds that neither the board nor Mr. Jennings was obligated to announce prior to the hearing that Mr. Jennings would be the hearing officer. (See 49er Request No. 2) His role was known then; no objection was raised.

the one exception noted) supported by the weight of the evidence. Based on the findings, the board concluded that good cause has been shown for terminating the relationship with petitioner. The court agrees with the conclusion of the board.

The determination of the board that there was "good cause" for termination is supported by the weight of the evidence. The petition for peremptory writ of mandamus is denied. Judgment to be prepared by Real Party in Interest.

Dated: September 19, 1983.

Richard E. Tuttle
Judge of the Superior Court

APPENDIX C

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NO. 26

Honorable Frank W. Shaw, Judge

No. 777974

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Petitioner,

vs.

THE NEW MOTOR VEHICLE BOARD,

Respondent,

49er CHEVROLET,

Real Party
in Interest.

MINUTE ORDER

1. Prior to its amendment in 1979, California Vehicle Code Section 3001 mandated that four out of nine members of the New Motor Vehicle Board be new car dealers. Vehicle Code Section 3060, provided that a dealer franchise may not be terminated unless the board finds good cause for said termination. Vehicle Code Section 3066, provided that a hearing must be held when a protest is registered to the proposed termination of a franchise.

In the case of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, the court held that Vehicle Code Sections 3060 and 3066 were unconstitutional in that they were violative of due process

under California Constitution, Article I, Section 7, and under the Fourteenth Amendment to the United States Constitution. The court held that "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors*, supra, p. 992.)

The court further stated that dealer members of the Board have an economic stake in every franchise termination case that comes before them and that it is sufficiently clear that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

In 1979 the legislature amended the vehicle code to provide that "a member of the Board who is a new motor vehicle dealer may participate in . . . hear . . . and comment or advise other members upon, but may not decide, any matter involving a protest" against termination by a manufacturer. (Vehicle Code Sections 3050(d), 3066(d)). According to Senate Bill No. 417, which introduced these amendments, such dealer participation was required to provide educated and needed advice to the Board.

The question presented to the Court in the case at bar is whether said amendments cured the constitutional infirmity found by the court in *American Motors*. This court holds that the 1979 amendments to the Vehicle Code do not cure the unconstitutionality of the earlier provisions of the statute. Although American Motors is not, in this

Court's judgment, dispositive of the issue as to whether or not full participation by dealer-Board members in the hearing process but without the right to vote is unconstitutional, it is the opinion of this court that the participation of dealer-Board members provided for by the 1979 amendments is also unconstitutional under the rationale of American Motors, and for the primary reason that, even though the dealer-Board members no longer have the right to vote, they nevertheless have the opportunity to otherwise fully participate in the adjudicatory process, whereas the manufacturers are left unrepresented, thus depriving the manufacturers of an impartial tribunal. This statutory procedure is clearly violative of due process and is therefore unconstitutional.

It is this Court's opinion that the case of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, does not overrule the Court of Appeals decision in *American Motors.* The interest involved in the decision making process in the case at bar consists of the dealer-Board members' economic interest in the cases being decided. The plurality opinion in Andrews specifically distinguishes the situation where such an economic interest exists, and states that bias is presumed in that situation.

a. Petitioner did not waive its right to raise its constitutional claims in this court by omitting to make those claims before the Board. Petitioner's challenge was directed to the constitutionality of the New Motor Vehicle Board's enabling legislation, and, as such, was properly made in the trial court. Petitioner could not raise its claim before the Board, because an administrative agency created by the legislature has no power to declare a state statute unconstitutional.

2. As a second ground for granting the writ of mandate, this Court adopts the language of *Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435, and finds that it applies to the case at hand insofar as it holds that in order to have a termination of an existing franchise, a franchisee must have some period of time remaining on his written agreement, and that there can be no wrongful refusal to continue an existing franchise unless the franchisee had some contractual right to continuation. In the present case, Petitioner did not deprive the real party in interest of any time remaining on its current Dealer Sales and Service Agreement, nor did it refuse to continue any agreement which gave the real party in interest a right to a continuation.

The *Witt* case points out the stark reality that if this Court were to adhere to the interpretation of Vehicle Code Section 3060, which Respondent argues is correct, it would engraft on the franchise agreement a continuing term that could never be terminated except for one or more of the "good cause" conditions enumerated in the section. Thus, a lease with a definite term and no right to continue could become a contract in perpetuity. This Court finds that the legislature did not intend such a drastic amendment to contractual rights and duties between parties to such a contract when it enacted Vehicle Code Section 3060.

Therefore, the Court finds that the Board acted in excess of its jurisdiction in the case at bar.

3. For the foregoing reasons the Petition for Writ of Mandate is granted.

4. No findings of fact and conclusions of law, as provided by Rule 232 of the California Rules of Court, are re-

quired in the case at bar. The Court is deciding this case solely on the above enumerated grounds, both of which were decided by this Court as a matter of law. Attorney for Petitioner shall prepare a form of judgment consistent with the Court's order in accordince [sic] with Rule 232 of the California Rules of Court.

DATED: 7-31-81.

/s/ Frank F. Shaw
Judge of the Superior Court

APPENDIX D

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-271-80

In the Matter of the Protest of 49er CHEVROLET,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

ORDER OF DISMISSAL

PURSUANT TO THE Minute Order dated July 31, 1981, and Judgment dated August 20, 1981, of the Honorable Frank W. Shaw, Judge of the Superior Court of the State of California, City and County of San Francisco, in the matter of *Chevrolet Motor Division, General Motors Corporation* vs. *New Motor Vehicle Board;* 49er Chevrolet, Real Party in Interest; Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc., Additional Real Parties in Interest (San Francisco Superior Court No. 777974) (*49er Chevrolet* vs. *Chevrolet Motor Division, General Motors Corporation,* Protest No. PR-271-80), the New Motor Vehicle Board hereby sets aside its Decision

of January 28, 1981, rendered in the above-entitled Protest, and dismisses said Protest for lack of jurisdiction.

DATED: January 5, 1984

NEW MOTOR VEHICLE BOARD

By /s/ Robert J. Beckus
Robert J. Beckus
Public Member
New Motor Vehicle Board

APPENDIX E

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION THREE

A025621

San Francisco County
Superior Court No. 777974

49er Chevrolet, et al.,

Petitioners,

vs.

The New Motor Vehicle Board,

Respondent,

General Motor Division, etc.,

Real Party in Interest.

BY THE COURT:

The petition for writ of mandate is denied as moot. (White, P. J., Scott, J. and Merrill, J. participated in the decision.)

Dated: May 17, 1985

White, P. J.

APPENDIX F

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

3 Civil 23426
CALAVERAS 11169

49ER CHEVROLET and RICHARD E. WILMSHURST,
Plaintiff and Appellant,

v.

NEW MOTOR VEHICLE BOARD
Defendant and Respondent

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Real Party in Interest and Respondents.

By the Court:

Appellants' petition for rehearing is denied.

Dated: March 29, 1985.

CARR, Acting P. J.

APPENDIX G

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

3nd [sic] District, Civil No. 23426

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

WILMSHURST etc.,

Petitioner,

v.

NEW MOTOR VEHICLE BOARD,

Respondent;

CHEVROLET MOTOR DIVISION OF
GENERAL MOTORS CORP.,

Real Party in Interest

Petition for review DENIED.

/s/ Broussard
Acting Chief Justice

APPENDIX H

Richard E. Wilmshurst
President
49er Chevrolet
1103 Main Street
Angels Camp, CA 95222
Telephone: (209) 736-2514

IN THE COURT OF APPEAL OF THE
STATES OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 Civil No. 23426
Superior Court No. 11169

49ER CHEVROLET and RICHARD E. WILMSHURST,

Petitioners and Appellants,

v.

NEW MOTOR VEHICLE BOARD,

Respondent,

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that 49er Chevrolet and Richard E. Wilmshurst, appellants above-named, hereby appeal to the Supreme Court of the United States from the denial of a hearing by the Supreme Court of the State of California in the proceeding *Richard E. Wilmshurst, et al v. New Motor Vehicle Board et al,* 3 Civil 23426, sustaining the judg-

ment of the Calaveras County Superior Court, denying appellants a Writ of Mandamus, filed March 4, 1985, by the Court of Appeal and hearing denied by the Supreme Court of the State of California on May 15, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2) by way of appeal.

49er Chevrolet

by /s/ Richard E. Wilmshurst
Pro Se

Dated: July 12, 1985